Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY

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SUMMARY OF THE ARGUMENT

The Court should deny the Petition because the decision of the Second Circuit Court of Appeals is interlocutory, and further proceedings in the district court are required to develop the factual record necessary to determine whether the ordinances in question violate the Dormant Commerce Clause (U.S. Const. Art. I, § 8, cl. 3). The court below expressly recognized the possibility that the district court, applying the *Pike v. Bruce Church*, 397 U.S. 137 (1970) balancing test to a full set of facts, might allow petitioners to prevail on their claim.

The record is inadequate because there has been no fact finding on the nature and extent of the alleged injury to interstate commerce; no identification of the out-of-state economic interests allegedly affected by the Oneida-Herkimer legislation; no evidence of any alternatives available to the counties to achieve their objectives in waste management; and no exploration of the interplay between these regulations and those of municipalities in other states.

On the merits, the decision below is entirely consistent with *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994) and the Court's other processing cases. The court of appeals properly distinguished this case from *Carbone* because the burdens of the Oneida-Herkimer regulatory scheme fall equally on all private sector actors, regardless of local or interstate location. Oneida-Herkimer's legislation affects no waste generated in other states, and targets no out-of-state business for different treatment from any local business. The court's conclusion that strict scrutiny should not be invoked under such circumstances is fully consistent with the long-established precedents of this Court.

The Second Circuit's decision does not conflict with the decision of any other appellate court, because no other court has yet addressed it. Petitioners argue that its outcome is "inconsistent" with results elsewhere. (Pet. 17). This Court does not review "inconsistencies," but instead resolves conflicts. The cases cited by the petitioners and their *amici* only reflect the diversity of approaches to waste management taken by governmental entities across the country, not conflicting approaches to constitutional analysis.

Finally, this is not an exceptional case that warrants immediate review. The ruling below does not create a "sea change" in the law, nor does it add or detract from existing public responsibilities in waste management. Contrary to petitioners' hyperbole, this decision will not reduce the continued reliance of state and local governments upon the interstate trade in waste services.

STATEMENT OF FACTS

Prior to 1989, the waste management practices of both the private and public sectors in the New York counties of Oneida and Herkimer were woefully disorganized and environmentally hazardous. The counties and the state endeavored to protect the health and safety of the public with a comprehensive plan to build several new facilities within an overall program to be administered by a new public agency organized solely for that purpose, the Oneida-Herkimer Solid Waste Management Authority. (Pet. App. 4a). This undertaking was an exercise of traditional municipal sovereign power, which necessarily regulated and curtailed the activities of all private waste businesses, as well as every person generating waste in the counties.

The petitioners in this case are local waste collectors. Prior to the institution of the public waste management system, they were accustomed to delivering waste to dump sites of their own choosing, and wish to do so again. Petitioners' objective in this case is to be free of the obligation to participate in the regional waste plan, and regain the ability to landfill waste at the location of their choice. The counties' objectives are to reduce the amount of local waste going to landfills overall, ensure safe and proper disposal, and increase the amount being recycled. The difference between these public and private objectives is at the heart of this dispute.

REASONS FOR DENYING THE WRIT

I. The Non-Final Nature of the Decision Below Counsels Against Certiorari

The petitioners sued the respondents in April 1995, moved for summary judgment based on affidavits and accompanying legislative documents in June 1995, and oral argument occurred in October 1995. Petitioners obtained a stay of discovery pending resolution of the summary judgment motion. The court of appeals noted: "Accordingly, no discovery took place prior to the district court's determination of United Haulers' summary judgment motion that is the subject of this appeal." (Pet. App. 18a-19a).

The court below reversed the summary judgment, disagreeing with the trial court's application of the Commerce Clause and "remand[ed] to the district court to consider whether the ordinances impose burdens on interstate commerce that are clearly excessive in relation to the local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)." (Pet. App. 2a). The court admitted to a "temptation

to undertake the *Pike* balancing test in the first instance," but "resist[ed] the temptation to rule as a matter of law prior to adequate discovery and further argument by the parties, which will undoubtedly assist the district court in this fact–intensive determination." (Pet. App. 32a).

Two principles counsel against granting certiorari. First, even if the question presented ("whether the prohibition against 'hoard[ing] solid waste' recognized in *Carbone* is inapplicable when the 'preferred processing facility' is owned by a public entity") (Pet. (I)) presents a potentially interesting issue, its ultimate resolution would be better decided on a factual record that conveys a complete picture. In *Askew v. Hargrave*, 401 U.S. 476 (1971), the court counseled against precipitously deciding on remand the equal protection question: "Since the manner in which the program operates may be critical in the decision of the equal protection claim, that claim should not be decided without fully developing the factual record at a hearing." *Id.* at 477.

In this case, the Oneida-Herkimer flow control ordinances affect haulers, landfills, recyclers, transfer stations and ultimately, the citizens and businesses of the two counties. This Court has

> recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. ***In either situation, the critical consideration is the overall effect of the statute on both local and interstate activity.***

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986) (emphasis supplied).

The *Askew v. Hargrave* homily applies to the instant Commerce Clause inquiry, and provides a reason for denying certiorari. *See also Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948) ("Summary procedures . . . present a treacherous record for deciding issues of far flung import. . .").

Those concerns are buttressed by the jurisprudential caution toward review of interlocutory orders. *See American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893) (review of an interlocutory order should not occur "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until the final decree"); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this court"); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993). ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., concurring).

We do not ignore the plea of the Petition, p. 22 ("It is imperative that this Court review and reverse . . . now . . .") and *amicus* New Jersey's desire to have the Court grant review and affirm the decision below ("New Jersey however, parts with petitioner by asking the Court to uphold the decision of the Court of Appeals. . ."). (*Amicus Curiae* Brief of New Jersey in Support of Certiorari, p. 2). Their differing views on the correctness of the interlocutory decision below adds to the reasons for the Court having a fully-developed

record and a final decision on the merits before it considers whether certiorari review is necessary or appropriate. Only then, if review were granted, would the Court be able to confidently adjudicate any Commerce Clause dispute.

Denial of certiorari review of an interlocutory decision does not preclude presentation of the same questions if certiorari is sought after a final judgment, if the questions are properly preserved. *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 672 n.19 (1979). Therefore, patience — in the form of awaiting a final judgment — will allow the petitioners and their *amici* to seek review later, if they are dissatisfied with the final judgment.

Recently, after full briefing and oral argument, the Court dismissed a writ of certiorari as improvidently granted despite the importance of the question because "it would require a threshold inquiry into issues decided by the Court of Appeals but not presented in the petition for certiorari." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. __ (November 27, 2001). The Court wrote:

> Petitioner points out that this case presents questions of fundamental national importance calling for final resolution by this court. But the importance of an issue should not distort the principles that control the exercise of our jurisdiction. To the contrary "by adhering scrupulously to the customary limitations on our discretion regardless of the significance of the

> underlying issue, we promote respect . . . for the Court's adjudicatory process."

Id., Slip Op. p. 7 (citations omitted).

Here, denying the writ would be consistent with customary limitations on the Court's discretion, but would not foreclose review if sought after final judgment.

II. The Court of Appeals Correctly Distinguished the Oneida-Herkimer Laws From Those of Clarkstown, and the Decision Is Not in Conflict with *Carbone*

The court of appeals decision does not "circumvent" this Court's decision in *C&A Carbone v. Town of Clarkstown*, or threaten to render it "a dead letter." (Pet. 2-3). Petitioners incorrectly read *Carbone* to require that the courts eschew the "sensitive case by case analysis of purposes and effects" called for by *West Lynn Creamery, Inc v. Healy*, 512 U.S. 186 (1994), in favor of a result that protects private interests over public ones whenever there is conflict.[1] (Pet. 14).

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1. Contrary to the implication in the petition (p. 14), the court of appeals did not say, or even imply, that if legal title to a designated facility were held by a private company, the result would be that the designating legislation is "per se" unconstitutional, or otherwise pre-ordained. The Second Circuit has painstakingly reviewed numerous flow control statutes after *Carbone*. *See SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir 1995), *cert. denied*, 516 U.S. 1112 (1996); *USA Recycling v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996); *Gary D. Peake Excavating Inc. v. Town Bd. of Town of Hancock*, 93 F.3d 68 (2d Cir. 1996); *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46 (2d Cir. 1998), *cert. denied*, 525 U.S. 923 (1998); *Automated Salvage Transport Inc. v. Wheelabrator*, 155 F.3d 59 (2d Cir. 1998); *Incorporated Village of Rockville Centre v. Town of Hempstead*, 196 F.3d 395 (2d Cir. 1999).

The court of appeals correctly recognized that when local government regulates for health and safety, it acts as a sovereign, which means it is in a different class than the entities it regulates. Contrary to the petitioners' argument (Pet. 14-15), the court's identification of the sovereign's interest in its legislation is hardly the "formalistic distinction" this Court rejected in *West Lynn Creamery*. It is indispensable to any constitutional analysis.

The Second Circuit did not arrive at the result reached here through a shortcut analysis. The differences between the legislation presented in *Carbone* and the regulations examined here are clear and substantial. The court noted several features of the Clarkstown scheme which are not present in Oneida-Herkimer's system, and others which are present here but were not evident in Clarkstown.

A. Legislative Differences Between the Clarkstown and Oneida-Herkimer Regulatory Systems

First, there is no "over-reaching" by Oneida-Herkimer to capture waste generated in other counties or other states, where Clarkstown purported to control waste generated in New Jersey. (Pet. App. 21a). None of the petitioners alleged that they handle any waste generated in other states, and the local laws would not prevent them from doing so if they did. (Pet. App. 21a n.4). The Authority's authorizing legislation actually prohibits the acceptance of waste generated outside of the counties at Oneida-Herkimer's facilities. (Pet. App. 4a).

Second, there is no local operator receiving any arguable benefit from the local legislation. (Pet. App. 22a). In Clarkstown, the ordinance required the public and local

haulers to pay fees directly to the private transfer station operator. In Oneida-Herkimer no contractor is empowered to charge or collect fees. The disposal transaction is between the public or their licensed haulers, and the Authority.

Third, with the acceptance of the waste comes title and public responsibility for its ultimate disposal. Once it accepts delivery, Oneida-Herkimer is directly responsible for fulfilling its disposal obligations. Virtually all of Oneida-Herkimer's waste has been disposed of in interstate commerce (at Pennsylvania landfills or with recyclables markets in dozens of states and Canada) since 1991. (Pet. App. 6a-7a). Clarkstown, on the other hand, was not obliged to either collect fees, arrange for disposal, or handle the waste in any way.

Fourth, the Oneida-Herkimer facilities were planned and constructed after a long and deliberative public process, undertaken after the demonstrable failure of private enterprise and decentralized public efforts to address the waste problem. (Pet. App. 2a-5a). In contrast, Clarkstown's 1990 legislation was adopted as a quick fix to deal with the imminent closure of the Town's unlined landfill, pursuant to its August 1989 Consent Order. *Carbone*, 511 U.S. at 383.

The most significant difference between this case and *Carbone* can be found in the purposes of the laws. In Oneida-Herkimer, a public agency was created to procure, construct, and operate facilities capable of handling all of the region's waste pursuant to a long range plan adopted with public participation. The Authority is a party to all of the disposal transactions which take place, and thereby assumes the responsibilities and potential liabilities which go with it. (Pet. App. 3a). *See* Comprehensive Environmental Response,

Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (CERCLA); *BF Goodrich v. Murtha*, 958 F.2d 1192 (2d Cir. 1992).

In contrast, the Clarkstown legislation was designed to ensure the consummation of private commerce, and if the local legislation had been successfully enforced, to keep the Town *out* of the disposal business. As all of the opinions in *Carbone* recognized, the Clarkstown legislation would not involve the commitment of public funds or government responsibility *unless* the tonnage guaranteed to the private operator did not materialize. If the tonnage did arrive, on the strength of the local ordinance, the operator would be enriched and the Town would not be responsible for disposal.

Here the Second Circuit, comparing the two legislative schemes, recognized the critical difference.

> Moreover, ordinances that favor a public facility to the detriment of all private actors are equipped with a built-in check: municipal legislators are accountable to citizens, many of whose interests are likely to be aligned to some degree with the interests of private business. . . . Where local legislation benefits local industry to the detriment of its competition, as in all of the processing cases, this check is inadequate. Here it is not.

(Pet. App. 28a).

B. The Oneida-Herkimer Laws Present No Risk of Retaliatory Measures by Other States

The petitioners also argue that the laws amount to "local economic protectionism," and that this will invite retaliation from other states. (Pet. 13-14). The absence in the Oneida-Herkimer legislation of any interstate reach to capture waste generated in other states largely eliminates any risk of retaliatory action by a neighboring state. In *Carbone* it was the effect of the Clarkstown legislation on waste originating in New Jersey which supported the Court's finding that Clarkstown's law "drives up the cost for out-of-state interests to dispose of their solid waste." 511 U.S. at 389.

More importantly, retaliation will not occur because Oneida-Herkimer is simply exercising its municipal power, derived from the sovereign power of the State of New York, to provide the same sort of governmental service which all other states have traditionally provided to their citizens.

The power to provide exclusive municipal waste disposal service was recognized by the Supreme Court almost one hundred years ago in *California Reduction Company, et al. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905), when the Court rejected a challenge by local waste "scavengers" to San Francisco's award of a disposal franchise to a single company. In 1976, Congress acknowledged (without expanding or diminishing) the traditional power of states and local governments to regulate for the provision of comprehensive waste services in the Resource Conservation and Recovery Act (42 U.S.C. § 6901 *et seq.*) ("RCRA"). RCRA is the foundation for all of the solid waste management plans which have since been adopted by the states, and within the states, by designated planning jurisdictions, including

Oneida-Herkimer.[2] RCRA's "blueprint" for national reform in waste management calls for new methods focusing on waste reduction and recycling, to be managed primarily by state and local government. 42 U.S.C. § 6901(a)(4).

RCRA's planning provisions contemplate that different solutions to the nation's waste problems would be attempted in different areas of the country, each tailored to the unique local geography, population, customs, and practices in the community. This approach pre-supposes the continued exercise of sovereign state power to regulate — in an even-handed, nondiscriminatory manner — the activities of the private sector. There is no suggestion here that New York's regulatory scheme (of which Oneida-Herkimer's is a part) interferes with the regulations of other states. However, as the court of appeals noted, should petitioners present evidence of any such interference, "the *Pike* test is a suitable vehicle for meaningful judicial review." (Pet. App. 29a).

III. The Decision Is Not in Conflict With Any Decision of Another Circuit Court of Appeals

Petitioners argue that the decision below is "inconsistent" with the decisions of other courts of appeals which have invalidated flow control laws directing waste to public facilities. (Pet. 17). They concede, as the Second Circuit pointed out, that the cases cited did not address the public/private distinction, and therefore they cannot argue that there is actual conflict between the circuits on the same important matter. Rather, they stress an inconsistency in result, and fear a trend of decisions upholding non-discriminatory regulation which restricts the actions of the private sector generally.

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2. No plan was adopted by Clarkstown, which is not a designated planning unit under New York Law.

A review of the regulatory approaches taken in the cases cited by both the petitioners (Pet. 17-19) and the court of appeals (Pet. App. 29a-30a) confirms a variety of particular problems, proposed solutions, regulatory philosophies, and difficulties with the private sector. The waste management challenges facing localities as diverse as western Kentucky,[3] northern and central Minnesota,[4] metropolitan Nashville,[5] rural Nebraska,[6] south Florida[7] and all of New Jersey[8] were each unique and reflective of local conditions. Local problems give rise to different regulatory solutions, which impact different interests in different ways.

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3. *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707 (6th Cir. 2000).

4. *Randy's Sanitation v. Wright County*, 65 F.Supp.2d 1017 (D. Minn 1999); *Zenith Kramer Waste Systems v. Western Lake Superior Sanitary District*, 1996 WL 612465 (D.Minn. 1996).

5. *Waste Management Inc v. Metropolitan Govt.*, 130 F.3d 731 (6th Cir 1997).

6. *U&I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir 2000).

7. *Coastal Carting Ltd. v. Broward County*, 75 F.Supp.2d 1350 (S.D. Fla. 1999).

8. *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995). New Jersey's statutory scheme has been extensively litigated. Certiorari for *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995), was denied in *Essex County Utilities Authority v. Atlantic Coast Demolition & Recycling*, 522 U.S. 966 (1997) and *Shinn v. Atlantic Coast Demolition & Recycling*, 522 U.S. 966 (1997).

Yet the courts reviewing challenges to these diverse regulations have uniformly applied the constitutional analysis described in *Carbone* and this Court's other Commerce Clause cases. This case presented the Second Circuit with facts highlighting the distinction between public and private sector services, with "no confusion or room for debate regarding the ownership of the favored facilities." (Pet. App. 31a). Other cases in other jurisdictions have not been free of confusion or debate over ownership or local private benefit, and reviewing courts have often found alternate grounds for decision. This does not amount to conflict, but simply reflects the application of uniform principles of law to difficult and diverse facts.

The courts are upholding the regulatory solutions which do not conflict with the Commerce Clause, and striking down those that do. This is a process which will continue, just as private interests will continue to chafe against public regulation. This case, like the *Carbone* decision itself, "while perhaps a small new chapter in that course of [waste transfer and treatment] decisions, nevertheless rests upon well-settled principles of our commerce clause jurisprudence." 511 U.S. 383, at 386.

IV. The Market Participation Doctrine Is Not Applicable

It is the exercise of sovereign power by local government which eliminates any "tension" (Pet. 15-16) between the market participant doctrine and the decision here. Market participation, under the relevant decisions of this Court, is government action which is excepted from scrutiny under the dormant Commerce Clause. It arises only when the government acts as a buyer or seller in the market, not as a sovereign regulating the actions of others. *Hughes v.*

Alexandria Scrap Corp., 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). Here the Oneida-Herkimer respondents are indisputably regulating, and have not claimed market participant status for any of their actions.

Nevertheless, petitioners assert that reviewing these local laws under the *Pike* balancing test somehow gives municipalities "carte blanche" to "be emboldened to enter any number of markets and then use their regulatory powers to favor themselves over private interstate competitors." (Pet. 16-17). How this would occur, the petitioners do not make clear. There is a large body of law governing the limits of municipal restraint of competition in private markets, (*e.g.*, *Parker v. Brown*, 317 U.S. 341 (1943); *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389 (1978)) which would constrain such boldness. The *Pike* test, applied below, will afford petitioners an opportunity to elaborate on this prediction.

V. The Decision Is Not So Important as to Require the Court's Immediate Attention

Finally, the petitioners argue that this Court must immediately accept this case for review in order to prevent a "sea change" in the way the nation's waste is handled. (Pet. 22). There is nothing in the record made thus far to support such hyperbole. Much, if not most, of the nation's waste already moves in interstate commerce, and is likely to continue to do so. Nothing about flow control makes it easier for municipalities to site and build waste disposal facilities within their jurisdictions. Almost every major metropolitan area in the country long ago closed the last of the local landfills, and virtually all of them rely on the interstate market for disposal capacity. This will not change due to the decision below.

While states and local governments continue to bear the responsibility to provide safe and effective waste management for their own citizens, no state is anxious to manage the waste generated by its neighbors. To the contrary, local governments which have managed to find effective solutions which do not involve siting, building or acquiring public facilities are not likely to reverse course. Public waste management solutions remain "expensive and time-consuming" even as this decision serves to remove some of the constitutional "guesswork" and "fill[s] in one more piece of the puzzle." (Pet. App. 12a).

In any case, the decision below works no hardship on the petitioners, as they may pursue their arguments in the district court to show that the incidental burdens of the legislation outweigh its putative benefits. If they can establish, with additional facts, that the disparity between the benefits and the burdens is great enough, they may yet prevail. Whether they do or not, this case may again make its way to this Court, when the merits or demerits of the legislation can be reviewed on a full and complete record.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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